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No. _____

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DENNIS RELLA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether as an element of 18 U.S.C. §1962(d), RICO conspiracy to violate 18 U.S.C. §1962(c), the government must satisfy the "operation or management" test announced by the Court in Reves v Ernst and Young, 113 S.Ct. 1163 (1993) by proving that a defendant agreed to participate in directing the RICO enterprise's affairs or agreed that predicate acts be committed under the direction of upper management?

LIST OF PARTIES

Apart from Petitioner Dennis Rella, the other parties to the appeal before the United States Court of Appeals for the Second Circuit were Joseph P. Napoli, Harold M. Fishman, Marty Gabe and Alan Weinstein, as appellants, and the respondent, United States of America.

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DENNIS RELLA,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Dennis Rella respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Second Circuit, entered on January 24, 1995, which upon rehearing corrected factual inaccuracies and confirmed its original determination, dated August 4, 1994, affirming the Order of the United States District Court,

Eastern District of New York (Sifton, J.), entered on August 28, 1994.[1]

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[1] Petitions for Certiorari will be filed by mid-April, 1995, on behalf of Petitioner's co-petitioners, Alan Weinstein and Marty Gabe. Those petitions will raise issues similar to those raised in this Petition. Petitioner Rella joins in the arguments made on behalf of Weinstein and Gabe, to the extent applicable, and requests that his Petition be held in abeyance until petitions are filed on their behalf.

OPINION BELOW

The opinion of the Court of Appeals is officially reported at 32 F.3d 31 (2d Cir. 1994) and appears in the Appendix as 1a-13a. The opinion of the Court of Appeals granting rehearing, correcting factual inaccuracies, and confirming the original determination, is not officially reported, but appears in the Appendix as 14a-22a.

The Court of Appeals, in its original opinion entered August 4, 1994, affirmed the Order of the United States District Court, Eastern District of New York [Sifton, J.], denying Petitioner's motion, pursuant to 28 U.S.C. §2255, to vacate and set aside his RICO conspiracy conviction. In its January 24, 1995 opinion, the court granted rehearing to Petitioner Rella, corrected factual inaccuracies in its original opinion, and confirmed its original determination.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

The Order of the Court of Appeals sought to be reviewed, which granted rehearing, corrected factual inaccuracies, and confirmed the August 4, 1994 determination, was filed on January 24, 1995. Petitioner was permitted to remain at liberty, pending a disposition of his Petition for Certiorari, by Order of the United States Court of Appeals, Second Circuit, filed on February 17, 1995.

This Petition for a Writ of Certiorari is filed within the time prescribed by U.S. Sup.Ct. Rule 13, 28 U.S.C.A., and Rule 41(b) of the Federal Rules of Appellate Procedure.

STATUTES INVOLVED

18 U.S.C. § 1962(c):

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt."

18 U.S.C. § 1962(d):

"It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

STATEMENT OF THE CASE

Petitioner Dennis Rella, and six other persons, were accused by a grand jury of violating the federal anti-racketeering statute (18 U.S.C. § 1962[c]), and conspiring to violate the federal anti-racketeering statute (18 U.S.C. §1962[d]). Identified in the indictment were twenty-six racketeering acts, in which were alleged the commission of mail fraud (18 U.S.C. §1341) and bribery (N.Y. Penal Law §§200.00 and 215.00), in connection with the representation of plaintiffs in eighteen personal injury actions by persons employed by or affiliated with the Morris J. Eisen, P.C., law firm. Petitioner was named in six racketeering acts.[1]

---

[1] Also named in the indictment as co-defendants/co-conspirators were attorneys Morris J. Eisen, Joseph P. Napoli and Harold Fishman; investigators Al Weinstein and Marty (continued...)

Petitioner and his six co-defendants pleaded not guilty and, on November 4, 1990, proceeded to trial before Hon. Charles P. Sifton, U.S.D.J., and a jury. The trial continued until March 4, 1991, when the jury, after deliberating for three weeks, found Petitioner and his six co-defendants guilty of RICO and RICO conspiracy. However, the district court set aside that part of the jury verdict finding Petitioner guilty of RICO on the ground that the three racketeering acts he was found to have committed did not fall within the statute of limitations.

In essence, the theory of the prosecution was that Petitioner and his six co-defendants fabricated evidence, suborned perjury, bribed witnesses and committed

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[1](...continued)
Gabe; and the office administrator, Geraldine Morganti. The RICO enterprise was alleged to be the law firm, Morris J. Eisen,P.C.

mail fraud in connection with the representation by Morris J. Eisen, P.C., of plaintiffs in personal injury cases. Regarding Petitioner Rella, the government theorized that he committed these crimes while providing investigative services to the Eisen firm to facilitate the successful prosecution of these personal injury actions.

Petitioner and his co-defendants appealed, and the United States Court of Appeals, Second Circuit, affirmed (974 F.2d 246 [1992]). Thereafter, petitions for certiorari were filed on behalf of Petitioner and his six co-defendants.

While the petitions were pending, this Court announced its decision in Reves v Ernst and Young, 113 S.Ct. 1163 (1963). Petitioner and his co-defendants filed supplemental petitions, raising the same Reves issue which had been raised by co-defendant Napoli in his original petition

for certiorari. Certiorari was denied as to Petitioner and the six co-defendants, including co-defendant Napoli (see 113 S.Ct. 1619, 1840, 1841 [1993]).

In or about August, 1993, Petitioner and co-defendants Napoli, Fishman, Weinstein, and Gabe, sought the vacatur of their convictions, pursuant to 28 U.S.C. §2255, on the ground that Reves v Ernst and Young, supra, had announced a new rule of substantive law, i.e., the "operation or management" test to determine §1962(c) liability, and that, consequently, their jury had evaluated their respective cases under the erroneous (and now discredited) standard previously established by the Second Circuit in United States v Scotto, 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). (See 16a-17a).

Finding that Reves was applicable to their cases, the district court

nevertheless denied §2255 relief because, in the district court's opinion, the charge actually given to the jury satisfied the essence of Reves, and because any error was harmless (7a).

On appeal, the Second Circuit affirmed, albeit on different grounds (Napoli v United States, 32 F.3d 31). As to Petitioner and co-defendants Weinstein and Gabe, the court found that, unlike co-defendants Napoli and Fishman (12a), review of their substantive (Reves) claim was procedurally barred because they failed to raise the claim before their direct appeals were exhausted, i.e., the claim could have been raised in their petitions for certiorari (12a-14a).

On Petition for Rehearing, filed on behalf of Petitioner and co-defendants Weinstein and Gabe, irrefutable evidence was submitted to the court which established that, identical to co-defendant

Fishman, whose claim was not found to be procedurally barred, Petitioner and co-defendants Weinstein and Gabe had indeed raised their respective Reves claim in their supplemental petitions for certiorari before this Court denied their petitions (18a-19a).

Nevertheless, the Second Circuit, granting rehearing, corrected the factual inaccuracies in its original determination, but confirmed that determination. Without any discussion of Petitioner Rella's role or relationship to the RICO enterprise, the court explained that,

> "Petitioner Gabe carried out instructions from the law firm principals and exercised broad discretion in doing so. In one case he followed the directions of the trial attorney, Fishman, to bribe a witness not to testify and assisted Fishman in instructing two witnesses to testify falsely. In another case, he was instructed by *** the office manager, to photograph a pothole that supposedly gave rise to a personal injury claim and took it upon himself to

enlarge the pothole before photographing it. Weinstein attempted to bribe a witness to testify falsely in one case, and in two cases helped Fishman coach witnesses on false testimony. Clearly, Gabe and Weinstein were high up on the 'ladder of operation' and were guilty of the substantive RICO charges on which they were convicted. Petitioner Rella was convicted only on the RICO conspiracy charge, and that conviction is unaffected by the Reves error. *** Reves likewise does not affect the conspiracy convictions of Gabe and Weinstein" (21a; emphasis added).

REASONS FOR GRANTING THE WRIT

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED CONCERNING THE APPLICABILITY TO 18 U.S.C. §1962(d), RICO CONSPIRACY TO VIOLATE RICO, 18 U.S.C. §1962(c), OF THE "OPERATION OR MANAGEMENT" TEST, TO DETERMINE A DEFENDANT'S LIABILITY UNDER §1962(c), ANNOUNCED BY THE COURT IN REVES v ERNST & YOUNG, 113 S.Ct. 1163 (1993).

In Reves v Ernst & Young, 113 S.Ct. 1163 (1993), the Court, resolving the inter-circuit conflicts concerning the meaning of the phrase in 18 U.S.C. §1962(c) "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs", adopted the "operation and management" test (see Bennett v Berg, 710 F.2d 1361, 1364 [8th Cir. 1983] [en banc], cert. denied, 464 U.S. 1008 [1983]), and held that "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs', §1962(c), one must

participate in the operation or management of the enterprise itself" (113 S.Ct., at p1173).

The Reves majority added that §1962(c) liability "is not limited to upper management ***. An enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management" (113 S.Ct., at p1173); however, the Court declined to decide "how far §1962(c) extends down the ladder of operation" (113 S.Ct., at p1173, n9; see also United States v Viola, 35 F.3d [2d Cir. 1994]).

The Court also recognized that an enterprise might be "operated" or "managed" by "outsiders" who will be subject to §1962(c) liability "if they are 'associated with' an enterprise and participate in the conduct of its affairs -- that is, participate in the operation or management

of the enterprise itself" (113 S.Ct., at p1173).

The Reves majority affirmed the Eighth Circuit's application of the "operation or management" test to determine whether the "outside" accounting firm (Arthur Young & Co.) was subject to §1962(c) liability (113 S.Ct., at p1173), and concluded that summary judgment was properly entered dismissing the RICO claim against Arthur Young since its involvement in the alleged RICO enterprise was limited to the preparation of financial statements for the members of the enterprise's board (113 S.Ct., at pp 1173-4). The majority rejected the argument that Arthur Young's failure to disclose to the board that the value of an asset should have been its fair market value, rather than the enterprise's actual investment in the asset, amounted to participation in or management of the enterprise (113 S.Ct., at p1174).

Not discussed in Reves was its applicability to §1962(d), RICO conspiracy. In United States v Quintanilla, 2 F.3d 1469 (1993), the Seventh Circuit held that the Reves "operation or management" test is inapplicable to RICO conspiracy. The court explained that,

> "a RICO conspiracy requires only an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity. *** 'Under this approach, it is only necessary that the defendant agree to the commission of the two predicate acts on behalf of the conspiracy.'
>
> ***
>
> We have reasoned thus because to require the government to show that all of the alleged co-conspirators conducted, or participated in the conduct of, the affairs of the racketeering enterprise to the extent mandated by §1962(c) or other substantive RICO offense would entail 'a degree of involvement in the affairs of the conspiracy that is not required in any other type of conspiracy, where agreeing to a proscribed objective is sufficient.'
>
> ***
>
> We agree with the district court for the District of

> Columbia that '[t]o hold that under §1962(d) [the government] must show that an alleged co-conspirator was capable of violating the substantive offense under §1962(c), that is, that he participated to the extent required by Reves, 'would add an element of RICO conspiracy that Congress did not direct'" (2 F.3d, at pp 1484-5).

The court declined to address the issue of "whether at least one alleged co-conspirator charged under §1962(d) must be capable of violating §1962(c)" (2 F.3d, at p1485, n21).

The Second Circuit, at least initially, was less certain than the Quintanilla court about the applicability of Reves to §1962(d). In United States v Viola, supra, 35 F.3d, at p43, the court said that,

> "[r]eversal of [the defendant's] substantive RICO conviction because he did not participate in the operation or management of the enterprise does not require automatic reversal of his conviction under RICO's conspiracy provision, 18 U.S.C. §1962(d)" (emphasis added).

However, a different Second Circuit panel, after finding that Petitioner's co-defendants, Gabe and Weinstein, both of whom (identical to Petitioner) were investigators for the RICO enterprise, "were high up on the ladder of operation" (21a), tersely stated, "Petitioner Rella was convicted only on the RICO conspiracy charge, and that conviction is unaffected by the Reves error" (21a; emphasis added).

In Jones v Meridian Towers Apartments, Inc., 816 F.Supp. 762 (D.D.C. 1993), cited with approval in Quintanilla, supra 2F.3d, at p1485, the district court concluded, inter alia, that "[n]othing in Reves *** requires that claims under §1962(d) allege management or operation of the enterprise by all of the alleged conspirators" (816 F.Supp., at p772), adding that,

> "[t]his Circuit has not yet addressed to what extent alleged co-conspirators must be involved in the underlying substantive offense to be held liable under

> §1962(d). Thus, the Court must look to other circuits for guidance. A majority of the circuits have held that a violation of §1962(d) occurs when a defendant agrees to the substantive RICO offense, regardless of whether he personally agreed to commit two predicate acts ***. The analysis in these [pre-Reves] cases applies equally to the conduct on participation requirement ***. To hold that under §1962(d) a plaintiff must show that an alleged co-conspirator was capable of violating the substantive offense under §1962(c), that is, that he participated to the extent required by Reves, 'would add an element to RICO conspiracy that Congress did not direct'" (816 F.Supp, at pp 772-3; see also Tonnemacher v Sasak, 859 F.Supp. 1273, 1277-8 [D.Ariz. 1994]; Morin v Trupin, 832 F.Supp. 93, 99 [S.D.N.Y. 1993]; Fidelity Federal Savings and Loan Association v Felicetti, 830 F.Supp. 257 [E.D.Pa. 1993]).

The courts holding that §1962(d) remained unaffected by Reves primarily relied upon two pre-Reves cases, viz: United States v Pryba, 900 F.2d 748 (4th Cir. 1990), and United States v Neapolitan, 791 F.2d 489 (7th Cir.), cert. denied, 479

U.S. 940 (1986). Both Pryba and Neapolitan were concerned with the issue of what must be agreed upon to constitute a RICO conspiracy and both cases reflect the substantial disagreement among the circuits (900 F.2d, at pp 759-60; and 791 F.2d, at pp 494-5; see also Jones v Meridian Towers Apartments, Inc., supra, 816 F.Supp., at pp 772-3, 773 n14).[3]

In seeming contrast to these cases is Aetna Cas. Sur. Co. v P & B Autobody, 43 F.3d 1546 (1st Cir. 1994), in which the

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[3]Specifically, the inter-circuit controversy was whether, as an element of RICO conspiracy, the government must prove that a defendant personally agreed to commit two or more specified predicate crimes. According to the court in Neapolitan, supra, 791 F.2d, at pp 494-5, both the First and Second Circuits had adopted the minority view that RICO conspiracy requires that each co-conspirator personally agree to commit two or more racketeering acts in violation of §1962(c) (see also United States v Pryba, supra, 900 F.2d, at p760).

court, without mentioning Reves and its applicability to §1962(d), said that,

> "[i]n addition to finding the individual Arsenal defendants liable for a RICO substantive violation with Aetna as the enterprise, the jury also found each of the individual Arsenal defendants liable for a RICO conspiracy violation under §1962(d). Liability on this theory is proved against a defendant by showing (1) the existence of enterprise affecting interstate commerce, (2) that the defendant knowingly joined the conspiracy to participate in the conduct of the affairs of the enterprise, (3) that the defendant participated in the conduct of the affairs of the enterprise, and (4) that the defendant did so through a pattern of racketeering activity by agreeing to commit, or in fact committing, two or more predicate offenses" (43 F.3d, at p1561)

As Petitioner Rella and his co-defendant's argued below (see United States v Williams, 112 S.Ct. 1735, 1738-41[1992]), in light of Reves, the government should be required, as an element of §1962(d), RICO conspiracy to violate §1962(c), to establish that a defendant agreed to

participate in directing the enterprise's affairs, or that a defendant agreed that the predicate acts be committed under the direction of upper management.

Stated another way, a defendant who, under the Reves' operation or management test, is not guilty of violating §1962(c), cannot be found to have violated §1962(d) unless he agreed to the commission of acts that involve participation in directing the enterprise's affairs. If the defendant did not agree to the commission of two or more predicate acts under the direction of upper management, the defendant should not be guilty of conspiring to violate §1962(c) (see Biofeedtrac, Inc. v Kolinor Optical Enterprises & Consultants, S.R.L., 832 F.Supp. 585, 592 [E.D.N.Y. 1993]; Morin v Trupin, supra, 832 F.Supp., at p99 [persons who are not liable under §1962(c) because they have no control over the enterprise

may be liable under §1962(d) if they conspire to control the enterprise]).

In denying §2255 relief, the Second Circuit found that the district court's jury charge that "'[t]he prosecution is not required to prove that the defendant participated in the management or control of the [RICO] enterprise'" (16a) was incorrect under Reves (see 21a). Similarly there was no instruction to the jury that, in order to convict under §1962(d), they must find that a defendant agreed to participate in directing the enterprise's affairs. Nor was the jury instructed that they must find that a defendant agreed to the commission of two or more predicate acts under the direction of upper management.

Even if the Reves' operation or management is not ordinarily applicable to a §1962(d) conspiracy to violate §1962(c), this case nevertheless requires a different

result. That is because the district court, having been persuaded that the RICO conspiracy was defectively pleaded (see Tr. 7338-41), inextricably linked the substantive RICO and RICO conspiracy by instructing the jury as follows:

> "Because of this relationship between the two counts, however, there is an exception to the general rule that your decision with respect to one count has no bearing on your decision with respect to the other. The exception is this. If you find a particular defendant not guilty of Count One (RICO) then you may not find him or her guilty of Count Two (RICO conspiracy). You simply will find the defendant not guilty of both.
>
> Only if you find a particular defendant guilty of Count One (RICO) may you go on to consider whether that defendant is also guilty of Count Two (RICO conspiracy)" (Tr. 9150-1).

Petitioner Rella's RICO conviction was set aside by the district court because the three predicate acts underlying the conviction fell outside the statute of limitations; however, Petitioner's RICO

conspiracy conviction, which was not set aside, was tied to the substantive RICO count by the district court's jury instructions. Consequently, a discussion of Reves and its relationship to Petitioner's conspiracy conviction is appropriate.

As argued below, Petitioner was an investigator, at one time employed by the enterprise, but later worked for the enterprise as an "outside" investigator. The government in its opening referred to Petitioner, and the other investigators, as "foot soldiers". Most assuredly, Petitioner was not "within the circle of people who operated or managed the enterprise's affairs" (United States v Viola, supra 35 F.3d, at p43). Petitioner's participation was limited to three predicate acts "which were undertaken without the exercise of appreciable discretionary authority *** [He] was not

consulted in the decision-making process and exercised no discretion in carrying out [management's] orders." (35 F.3d, at p43). In one of the three predicate acts, Petitioner was charged acting alone. No evidence was presented as to who, if anyone, in upper management directed him to engage in that predicate act. Had the jury been properly charged under Reves and the evidence relating to this predicate act been found to have been insufficient, thereby leaving two predicate acts, the viability of Petitioner's conviction, though minimally sufficient, would be tenuous (cf. United States v Paccione, 949 F.2d 1183, 1197-8 [2d Cir. 1991]).

In short, certiorari should be granted to review the substantial federal question remaining after this Court announced the "operation or management" test in Reves v Ernst and Young, 113 S.Ct. 1163 (1993), whether that test is applicable to a RICO

conspiracy to violate §1962(c), at least to the extent of requiring that the government prove that a defendant agreed to participate in the affairs of the RICO enterprise or that a defendant agree that two predicate acts be committed at the direction of upper management.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
March 19, 1995

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1362 through 1366—August Term, 1993

(Argued: May 18, 1994 Decided: August 4, 1994)

Docket Nos. 93-2587, -2593, -2594, -2700, -2704

JOSEPH P. NAPOLI, MARTY GABE, DENNIS RELLA, ALAN WEINSTEIN and HAROLD FISHMAN,

Petitioners-Appellants,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

MESKILL, MINER and MAHONEY,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York (Sifton, J.), denying motions to vacate and set aside RICO convictions for conducting and conspiring to conduct the affairs of an

enterprise through a pattern of racketeering activity, the district court having concluded that jury charge was consistent with requirement that defendant play some part in directing affairs of RICO enterprise.

Affirmed.

JOSEPH P. NAPOLI, Manhasset, NY, *Pro Se*.

MARTIN J. SIEGEL, New York, NY, *for Petitioner-Appellant Marty Gabe*.

RICHARD E. MISCHEL, New York, NY, *for Petitioner-Appellant Dennis Rella*.

RONALD DEPETRIS, New York, NY, *for Petitioner-Appellant Alan Weinstein*.

STEVEN R. KARTAGENER, New York, NY, *for Petitioner-Appellant Harold M. Fishman*.

FAITH E. GAY, Special Assistant United States Attorney, Brooklyn, NY (Zachary W. Carter, United States Attorney for the Eastern District of New York, Emily Berger, Assistant United States Attorney, Brooklyn, NY, of counsel), *for appellee*.

MINER, *Circuit Judge*:

Petitioners-appellants Joseph Napoli, Harold Fishman, Marty Gabe, Dennis Rella and Harold Weinstein appeal from an August 31, 1993 order of the United States District Court for the Eastern District of New York (Sifton, J.), denying their motions, brought pursuant to 28 U.S.C.

§ 2255, to vacate and set aside their convictions. Appellants were convicted, following a jury trial, of conducting, and of conspiring to conduct, the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c) and 1962(d). In their section 2255 motions, appellants contended that the district court's charge on the element of section 1962(c) requiring that the defendant "conduct or participate, directly or indirectly, in the conduct" of the affairs of the RICO enterprise, a charge based upon the settled law of this Circuit, *see United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), was incorrect under the Supreme Court's recent decision in *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993). The district court denied the motions, concluding that (1) there was no procedural bar to the habeas applications; (2) the charge given satisfied *Reves*; and (3) any error was, at most, harmless. For the reasons that follow, we affirm.

BACKGROUND

The convictions in this case arose from appellants' involvement in Morris J. Eisen, P.C., a large Manhattan law firm that specialized in personal injury suits. Napoli and Fishman were trial attorneys who were "Of Counsel" to the Eisen firm, with Napoli being the main trial attorney for the firm. Gabe, Rella and Weinstein were private investigators affiliated with the firm who assisted with trial preparation.

In our opinion affirming the convictions in this case, we summarized the evidence as follows:

> The evidence at trial established that the defendants conducted the affairs of the Eisen law firm through a pattern of mail fraud and witness bribery

> by pursuing counterfeit claims and using false witnesses in personal injury trials, and that the Eisen firm earned millions in contingency fees from personal injury suits involving fraud or bribery. The methods by which the frauds were accomplished included pressuring accident witnesses to testify falsely, paying individuals to testify falsely that they had witnessed accidents, paying unfavorable witnesses not to testify, and creating false photographs, documents, and physical evidence of accidents for use before and during trial. The Government's proof included the testimony of numerous Eisen firm attorneys and employees as well as Eisen firm clients, defense attorneys, and witnesses involved in fraudulent personal injury suits. Transcripts, correspondence, and trial exhibits from the fraudulent personal injury suits were also introduced.

United States v. Eisen, 974 F.2d 246, 251 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1841 (1993):

> The jury considered illegal acts committed in eighteen personal injury lawsuits in which the plaintiffs were represented by the Eisen firm. Appellants were found guilty of racketeering acts involving the following cases:
>
> | | |
> |---|---|
> | Napoli: | *Ferri, Mulnick, Robbins, Rehberger* |
> | Fishman: | *Aboud, Schwartz, Tuning, Nieves* |
> | Rella: | *Miceli, Rehberger, Schwartz* |
> | Gabe: | *Robbins, Stanton, Nieves* |
> | Weinstein: | *Aboud, Schwartz, Tuning, Nieves, Metrano* |

Id.

At trial, the district court charged the jury on the substantive RICO violation as follows:

> [T]he prosecution must show that the defendant whose case you are considering *knowingly and intentionally conducted or participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity*. . . .
>
> Simply put, the prosecution must prove that there is a meaningful connection between the pattern of racketeering activity and the affairs of the enterprise, that is, that the defendant knew of the existence of the enterprise and intended that its affairs be furthered by the defendant engaging in a pattern of racketeering activity.
>
> . . . .
>
> *The prosecution is not required to prove that the defendant participated in the management or control of the enterprise.* The prosecution is, however, required to prove that the defendant's actions were related to the enterprise and that those acts were known to and were intended to further the affairs of the enterprise and did in fact further the affairs of the enterprise.
>
> The prosecution need not prove, as the statute indicates, that the defendant directly participated in the conduct of the affairs of the enterprise. It must prove, however, that the defendant either directly or indirectly conducted or participated in the conduct of the enterprise's affairs through the pattern of racketeering activity.

J.A. at 33-34 (emphasis supplied).

The portion of the charge in which the district court instructed the jury that it need not find that the defendants participated in the management or control of the enterprise was, at the time it was given, a correct statement of the law of this Circuit under our decision in *Scotto*. 641 F.2d at 54. None of the appellants challenged the charge. On direct appeal, appellants raised numerous challenges to their convictions, all of which were rejected by this Court in an August 17, 1992 opinion. 974 F.2d 246.

On October 13, 1992, *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993), was argued to the Supreme Court, which rendered its decision in that case on March 3, 1993. Settling a split among the circuits, *compare Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.) (en banc) (adopting "operation or management" test), *cert. denied*, 464 U.S. 1008 (1983) *with Bank of Am. Nat'l Trust & Sav. Assn. v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986) (rejecting same test), and overruling in part our decision in *Scotto*, the Court answered in the affirmative the question "whether one must participate, in the operation or management of the enterprise itself to be subject to liability under [18 U.S.C. § 1962(c)]." 113 S. Ct. at 1166, 1172-73.

None of the petitioners, except Napoli, challenged the propriety of the jury charge on direct appeal. Napoli apparently noted in his reply brief that certiorari had been granted in *Reves*. He also noted this fact in his petition for rehearing to this Court and in his petition for certiorari. On April 8, 1993, about one month after the Court decided *Reves*, Fishman apparently filed a supplemental petition for certiorari,[1] requesting that *Reves* be applied to

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1 The Government asserts that it could not locate this supplemental petition, and Fishman has not presented it to this Court.

his case. The Supreme Court denied each of appellants' petitions for certiorari. 113 S. Ct. 1841 (Apr. 19, 1993) (Napoli, Rella, Weinstein and Fishman); 113 S. Ct. 1619 (Mar. 22, 1993) (Gabe).

During the Summer of 1993, appellants moved the district court, pursuant to 28 U.S.C. § 2255, to vacate and set aside their convictions, arguing that the district court's charge was incorrect in light of *Reves*. On August 28, 1993, the district court denied the motions, finding that (1) there was no procedural bar to the section 2255 applications; (2) the charge given satisfied *Reves*; and (3) any error was, at most, harmless. This appeal followed.

DISCUSSION

1. Reves v. Ernst & Young

Under section 1962(c), it is illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Reves* involved a civil RICO action brought by the trustee in bankruptcy of a farming cooperative against outside accountants who allegedly filed false financial statements for the cooperative, the charged enterprise. The district court in that case dismissed the section 1962(c) claim because the plaintiffs had failed to demonstrate that the accountants had participated in the operation or management of the enterprise, as required under the Eighth Circuit's interpretation of the provision.

The Supreme Court agreed with the Eighth Circuit's interpretation. First, the Court concluded that the word

"conduct," as it was used in the provision, required that the defendant exercise some degree of direction over the affairs of the enterprise. 113 S. Ct. 1169-70. The Court then reasoned,

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required. The "operation or management" test expresses this requirement in a formulation that is easy to apply.

Id. at 1170 (footnote omitted).

The Court further recognized that liability under section 1962(c) was not limited to "upper management," noting that "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management." *Id.* at 1173. However, the Court declined to decide "how far § 1962(c) extends down the ladder of operation" because it was clear that the accountants in that case were not acting under the direction of the cooperative's officers or board. *Id.* n.9.

The Government argues that the instructions given by the district court in this case, taken as a whole, are consistent with *Reves*. Because the district court instructed

the jury that the prosecution was not required to prove that the defendants participated in the management or control of the enterprise, we will assume for purposes of this appeal that the instructions were erroneous. Nevertheless, we conclude that Napoli and Fishman cannot show that any error in the instructions resulted in a complete miscarriage of justice such as would justify relief under section 2255, and Gabe, Rella and Weinstein cannot demonstrate cause for failing to challenge the instruction on direct appeal.

2. *Napoli and Fishman*

As we have noted, none of the appellants objected to the RICO instructions at trial, and only Napoli and Fishman challenged the instructions before their direct appeals were exhausted. Even if we assume that Napoli and Fishman preserved their challenges, we must bear in mind that not "every asserted error of law can be raised on a § 2255 motion." *Davis v. United States*, 417 U.S. 333, 346 (1974). The grounds provided in section 2255 for collateral attack on a final judgment in a federal criminal case are narrowly limited, and it has "long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *United States v. Addonizio*, 442 U.S. 178, 184 (1979). As a general rule, "relief is available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice.' " *Hardy v. United States*, 878 F.2d 94, 97 (2d Cir. 1989) (quoting *Addonizio*, 442 U.S. at 185 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962))). We conclude that, as to Napoli and Fishman, any error of law committed by the district court in charging the jury

was not such a fundamental defect giving rise to a complete miscarriage of justice as to support a collateral attack.

Under the plain error rule applicable to the review on direct appeal of challenges not raised at trial, we have held that a jury instruction which omits an element of the offense does not warrant reversal if the element was proven by overwhelming evidence. *See United States v. Tillem*, 906 F.2d 814, 824-25 (2d Cir. 1990). In *Tillem*, we were faced with a challenge to a RICO instruction that failed to require that the predicate acts be interrelated and continuous. We concluded that, although the charge would have been reversible error had it been objected to at trial, reversal was not warranted under the plain error rule because the proof overwhelmingly established that the predicate acts were interrelated and continuous. *Id.* at 825. On the state of the record in that case, we found that "any error resulting from the deficient instructions did not affect the fundamental fairness of the trial." *Id.*; *see also Ianniello v. United States*, 10 F.3d 59, 63-65 (2d Cir. 1993) (defective instruction did not warrant relief on § 2255 motion in light of overwhelming evidence).

Similarly, in *United States v. Thai*, No. 92-1641, 1994 WL 365425, at *29 (2d Cir. July 11, 1994), we rejected the appellant's challenge to a RICO instruction that allegedly did not comply with *Reves*. In that case, the proof at trial demonstrated that the appellant had played some part in directing the affairs of the charged enterprise. The plain error analysis applied in *Tillem* and *Thai* applies *a fortiori* here, since the plain error standard, under which we will correct an error that is "plain," "affect[s] substantial rights" and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *United States v. Olano*, 113 S. Ct. 1770, 1779

(1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)) (alteration in *Olano*), is less stringent than the section 2255 standard. Here, Napoli and Fishman cannot show that any error amounted even to plain error, let alone surmount the higher burden of showing that the error amounted to "a fundamental defect which inherently results in a complete miscarriage of justice."

In this case, there was overwhelming evidence presented to the jury that Napoli and Fishman played some part in directing the affairs of the charged enterprise. Although Napoli and Fishman contend that they were no more than outside, "Of Counsel," attorneys to the Eisen firm, the evidence demonstrated that they were not merely providing peripheral advice, but had participated in the core activities that constituted the affairs of the Eisen firm, namely, trying cases and obtaining settlements. *Cf. Azrielli v. Cohen Law Offices*, 21 F.3d 512, 521-22 (defendant who merely acted as attorney in allegedly fraudulent real estate transactions did not participate in management or control of RICO enterprise). Moreover, they discharged their responsibility through a pattern of illegal acts. In the *Ferri*, *Mulnick*, *Robbins* and *Rehberger* cases, the jury found that Napoli had procured false testimony through bribery, fabricated testimony for witnesses at trial and suborned perjury. The jury also found that Fishman had bribed witnesses, committed mail fraud and instructed witnesses to testify falsely in connection with the *Aboud*, *Schwartz*, *Tuning* and *Nieves* cases.

As attorneys for the Eisen law firm with primary responsibility for the actual litigation of lawsuits, Napoli and Fishman exercised a significant degree of direction over the affairs of the enterprise. Their role plainly involved participating in the control or management of the firm, within the definition of *Reves*. On the record in this

case, we conclude as we did in *Tillem* that the challenged instruction did not "affect the fundamental fairness of the trial," 906 F.2d 814. That being so, we must conclude that the instruction did not amount to a "fundamental defect which inherently results in a complete miscarriage of justice" warranting relief under section 2255.

3. Gabe, Rella and Weinstein

Unlike Napoli and Fishman, Gabe, Rella and Weinstein failed to raise their challenges on direct appeal. Accordingly, our review of their challenges is more limited. It is settled that a procedural default of even a constitutional issue will bar review under section 2255 unless the petitioner can show cause excusing the default and actual prejudice resulting from the challenged error. *Campino v. United States*, 968 F.2d 187, 189-90 (2d Cir. 1992); *see also United States v. Frady*, 456 U.S. 152, 166-68 (1982).

Relying on our decision in *Ingber v. Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988), these appellants argue that it would have been futile to raise their challenges on direct appeal in light of the settled law in this Circuit, and that this futility should excuse their default. While it may have been futile to raise the challenges in the district court, inasmuch as that court was bound by our precedents, we do not believe that it would have been futile to raise the challenges on direct appeal, and it certainly would not have been futile for these appellants to include the challenges in their petitions for certiorari.

In *Ingber*, we were faced with a defendant who sought to collaterally attack his conviction on a section 2255 motion after the Supreme Court interpreted the mail fraud statute, 18 U.S.C. § 1341, in a way that was favorable to him. 841 F.2d at 452-53. The Supreme Court's decision

was handed down after the defendant had exhausted his direct appeals and followed a decade of consistent precedent to the contrary in this Court and numerous other circuit courts. *Id.* at 454. We concluded that any attempt to raise the issue on direct appeal would have been "patently futile." *Id.* at 455. By contrast, there were several stages in the litigation at which Gabe, Rella and Weinstein could have raised their challenges to the jury instruction. As Napoli had done, they could have brought to this Court's attention that other circuits disagreed with our analysis in *Scotto* and that the Supreme Court had granted certiorari in *Reves* to resolve the split among the circuits on the construction of section 1962(c). Moreover, they could have raised the challenges in their petitions for certiorari, as did Fishman; given the split among the circuits, a factor not present in *Ingber*, and the fact that certiorari had been granted in *Reves*, it would have been anything but futile to do so. Accordingly, we must conclude that Gabe, Rella and Weinstein have not shown cause to be relieved from their procedural default and thus are not entitled to the relief they seek.

CONCLUSION

The order of the district court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1363 through 1365—August Term, 1994

Petitions for Rehearing

Submitted: November 15, 1994

Decided: January 24, 1995

Docket Nos. 93-2593, -2594, -2700

JOSEPH P. NAPOLI, MARTY GABE, DENNIS RELLA, ALAN WEINSTEIN and HAROLD FISHMAN,

Petitioners-Appellants,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

MESKILL, MINER and MAHONEY,

Circuit Judges.

Petitions for rehearing following judgment affirming order of United States District Court for the Eastern District of New York (Sifton, *J.*) denying motions, brought pursuant to 28 U.S.C. § 2255, to vacate and set aside convictions.

Rehearing granted as to three petitioners, factual inaccuracies corrected, and original determination confirmed.

MARTIN J. SIEGEL, New York, NY, *for Petitioner-Appellant Marty Gabe.*

RICHARD E. MISCHEL, New York, NY, *for Petitioner-Appellant Dennis Rella.*

RONALD E. DEPETRIS, New York, NY, *for Petitioner-Appellant Alan Weinstein.*

SUSAN CORKERY, Assistant United States Attorney, Brooklyn, NY (Zachary W. Carter, United States Attorney for the Eastern District of New York, Emily Berger, Assistant United States Attorney, Brooklyn, NY, of counsel) *for Respondent-Appellee.*

MINER, *Circuit Judge*:

I.

All the appellants named in the caption filed petitions for rehearing following our judgment affirming the order of the United States District Court for the Eastern Dis-

trict of New York (Sifton, *J.*) denying their motions, brought pursuant to 28 U.S.C. § 2255, to vacate and set aside their convictions. Familiarity with the opinion giving rise to our judgment is assumed. *See Napoli v. United States*, 32 F.3d 31 (2d Cir. 1994). Familiarity with our opinion affirming the judgments of conviction and sentence of the appellants on direct appeal in the underlying criminal case also is assumed. *See United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1841 (1993). We have summarily denied the rehearing petitions of Napoli and Fishman and therefore address only the petitions of Gabe, Rella and Weinstein ("Petitioners"), recounting only the facts that bear upon the issues presented in their petitions.

II.

The petitioners were private investigators employed by or affiliated with the law firm of Morris J. Eisen, P.C. They assisted the firm's attorneys in preparing for trial cases involving false witnesses, fabricated evidence and counterfeit claims. They were found guilty of various racketeering acts, and we affirmed their RICO convictions on direct appeal. In their § 2255 motions, these petitioners challenged the instruction advising the jury that "[t]he prosecution is not required to prove that the defendant participated in the management or control of the [RICO] enterprise." The challenge was based on the ruling in *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993), requiring proof of some degree of direction, or some part in the direction, of a criminal enterprise in order to support a RICO conviction. The challenged jury instruction met no objection at trial, but the *Reves* case was not decided until after the direct appeal was concluded

adversely to petitioners in this court. The instruction was correct under the law of this circuit when given, *see United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). *Reves* effectively overruled our determination in *Scotto* that proof of participation in the management or control of an enterprise is not necessary for a RICO conviction.

The statute at issue in both *Reves* and *Scotto* makes it illegal

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). The *Reves* decision arose out of a civil RICO action brought by the bankruptcy trustee of a farming cooperative, the alleged enterprise, against an outside accountant alleged to have filed false financial statements for the cooperative. The Supreme Court concluded that the claim failed because there was no proof that the accountant participated in the management or control of the enterprise. In arriving at that conclusion, the Court undertook an interpretation of the words "conduct" and "participate" in the context of section 1962(c):

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs.

Reves, 113 S. Ct. at 1170.

In rejecting the § 2255 motions of the petitioners, we found it unnecessary to review the merits of their claims because we determined that such a review was barred by procedural defaults on their part. *See Campino v. United States*, 968 F.2d 187, 189-90 (2d Cir. 1992). Finding that no objection was made at trial or on appeal to the instruction that management and control need not be proven, we concluded as follows:

> While it may have been futile to raise the challenges in the district court, inasmuch as that court was bound by our precedents, we do not believe that it would have been futile to raise the challenges on direct appeal, and it certainly would not have been futile for these appellants to include the challenges in their petitions for certiorari.

32 F.2d at 37. Accordingly, we determined that the petitioners' claims were procedurally defaulted and that there was no showing of cause to be relieved from the defaults. *Id.*

III.

On this petition for rehearing, petitioners argue that we overlooked the fact that each of them raised the *Reves* issue in connection with his direct appeal. Whether we overlooked the fact or whether it never was brought to our attention need not detain us at this point. Suffice it to say, the petitioners now claim that each preserved his objection by joining in the briefs of the co-defendants (including the brief of defendant Napoli, who raised the issue in his reply brief), *see* Fed. R. App. P. 28(i), and by either filing briefs supplemental to their

certiorari petitions after *Reves* was decided or by joining in other certiorari petitions and supplements making reference to *Reves*. We stand corrected on the factual matter brought to our attention. For the purpose of deciding this case, we pass the question of whether the issue properly was raised in a reply brief, *see United States v. Gigante*, 39 F.3d 42, 50 n.2 (2d Cir. 1994), or in briefs supplemental to certiorari petitions. We shall assume for the purpose of this rehearing petition that the issue properly was raised on appeal and that the only procedural default was the failure to object to the instruction given at trial.

IV.

In *United States v. Viola*, 35 F.3d 37 (2d Cir. 1994), a case that also involved an unobjected-to instruction correct under *Scotto* but erroneous under *Reves* (which was decided while the direct appeal was pending) we adopted a modified plain error rule:

> When the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial, and there is thus no cause to shift the burden of proving prejudice to the defendant. In this special context, as in harmless error under Rule 52(a), the government must show that the error did not affect the defendant's substantial rights.

Id. at 42.

If the case presently before us were on direct appeal, we would of course be constrained to apply the foregoing rule. We see no reason to do so here, however, because we are confronted with a collateral attack based

on a case that was decided after the direct appeal was concluded. We see no reason under the circumstances to shift the usual burden from the petitioners to the government. The burden therefore falls upon petitioners to demonstrate their entitlement to relief under § 2255 in this case based on "an error of law that constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice.' " *Hardy v. United States*, 878 F.2d 94, 97 (2d Cir. 1989) (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962))). That test was not met here. For the reasons that follow, petitioners' challenges fail even under the lesser requirements of plain error analysis. *See United States v. Thai*, 29 F.3d 785 (2d Cir.), *cert. denied*, 115 S. Ct. 456 (1994).

Of significant importance to our ultimate determination in this case is the following statement in *Reves*:

> We agree that liability under § 1962(c) is not limited to upper management, but we disagree that the "operation or management" test is inconsistent with this proposition. An enterprise is "operated" not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management.

Reves, 113 S. Ct. at 1173. The Court went on to say: "We need not decide in this case how far § 1962(c) extends down the ladder of operation because it is clear that [the outside accountant] was not acting under the direction of the Co-op's officers or board." *Id.* at 1173 n.9.

We have no difficulty in finding that the petitioners herein were "lower-rung participants" whose activities were conducted "under the direction of upper management." The managers were the lawyers who litigated and

settled the fraudulent lawsuits. The petitioners were investigators who provided substantial assistance to the lawyers who conducted the nefarious enterprise. They were therefore involved in playing a part in the direction of the affairs of the enterprise within the meaning of *Reves*. They "were thoroughly indoctrinated participants in the criminal activities of the [Eisen law firm]. *United States v. Wong*, No. 92-1602(L), slip op., 1994 WL 617584, at *5 (2d Cir. Nov. 8, 1994).

Petitioner Gabe carried out instructions from the law firm principals and exercised broad discretion in doing so. In one case he followed the directions of the trial attorney, Fishman, to bribe a witness not to testify and assisted Fishman in instructing two witnesses to testify falsely. In another case, he was instructed by Morgenti, the office manager, to photograph a pothole that supposedly gave rise to a personal injury claim and took it upon himself to enlarge the pothole before photographing it. Weinstein attempted to bribe a witness to testify falsely in one case, and in two cases helped Fishman coach witnesses on false testimony. Clearly, Gabe and Weinstein were high up on the "ladder of operation" and were guilty of the substantive RICO charges on which they were convicted. Petitioner Rella was convicted only on the RICO conspiracy charge, and that conviction is unaffected by the *Reves* error. *See United States v. Viola*, 35 F.3d at 43. *Reves* likewise does not affect the conspiracy convictions of Gabe and Weinstein.

The evidence of guilt of these petitioners of the RICO offenses with which they were charged was overwhelming. The erroneous instruction on management and control, in light of that evidence, cannot be characterized as a fundamental defect that inherently gives

rise to a complete miscarriage of justice. The motion for § 2255 relief therefore properly was denied.

V.

The petitions for rehearing filed by Gabe, Rella and Weinstein are granted, and upon rehearing, we correct the factual inaccuracies in our original opinion but adhere to our previous determination.